Ruling

Category: **Foreign Banks** **NOTICE***

Subject: **Business in Canada – Referral arrangement**

No: **2008 – 01**

Issue: The issue is whether a foreign bank (FB) that enters into an arrangement whereby a Canadian financial institution (FI) would undertake to refer some of its clients to the FB (the "Referral Arrangement") is engaging in or carrying on, by itself or through a nominee or agent, business in Canada for the purposes of Part XII of the *Bank Act* (BA).

Background: The FB, a credit card issuer located outside Canada, proposed to offer its credit cards to Canadian businesses. In order to do so, the FB would enter into a Referral Arrangement with a FI pursuant to which the FI would refer prospective cardholders to the FB. Under the Referral Arrangement, the FI would advise its clients of the availability of the FB's credit card product, and provide interested clients with brochures outlining the product as well as information on how to contact the FB outside Canada to request the opening of a credit card account. The FI would receive a fee for each credit card account opened in the name of a prospect that it referred to the FB. The FB would, from outside Canada, carry out all business functions and processes relating to both the issuance of the credit cards and the administration of the credit card accounts.

Considerations: The BA does not provide guidance on the factors that should or could be taken into account in determining whether a foreign bank is engaging in or carrying on business in Canada directly or through an agent or nominee. As such, in making its determination, OSFI generally assesses the particulars of each case against factors comparable to those often considered by judicial bodies in interpreting the concept of "carrying on business in Canada" under other statutes such as the *Income Tax Act*.

In this case, the only activities that would be carried out in Canada in respect of the FB's credit card program are those that the FI would carry out under the terms of the Referral Arrangement. It is OSFI's view that those activities are promotional activities. In assessing whether a business is carried out in a jurisdiction, judicial decisions[1] support the view that under the common law, promotional activities alone do not constitute carrying on business. The BA contains no provision that deems promotional activities to constitute the carrying on of business in Canada.

[1] See, for example, *Grainger & Son v. Gough*, [1896] A.C. 325 and *Re Geigy (Canada) Ltd. and Minister of Finance for British Columbia* (1968), 1 D.L.R. (3d) 354 (B.C.S.C.).

Conclusion: OSFI concluded that the activities that the FI would carry out in Canada in respect of the FB's credit card program would not, on their own, cause the FB to be engaging in or carrying on business in Canada for the purposes of Part XII of the BA. Consequently, there was no need to examine whether the FI was acting as the FB's agent or nominee.

Legislative References: Subsection 510(1) of the BA provides that, except as permitted by Part XII of the BA, a FB shall not:

(a) in Canada, engage in or carry on any business that a bank is permitted to engage in or carry on under the BA, or any other business;
(b) maintain a branch in Canada for any purpose;
(c) establish, maintain or acquire for use in Canada an automated banking machine, a remote service unit or a similar automated service, or in Canada accept data from such a machine, unit or service; or
(d) acquire or hold control of or a substantial investment in, a Canadian entity.

Subsection 510(2) of the BA provides that, for the purposes of Part XII of the BA, a FB is deemed to be carrying out or have carried out anything prohibited by subsection (1) if it is carried out by a nominee or agent of the FB acting as such.

Table of Concordance: The *Insurance Companies Act*, *Trust and Loan Companies Act* and the *Cooperative Credit Associations Act* do not contain similar provisions.